United States Court of Appeals

for the Second Circuit

APPENDIX

76-2108

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RONALD JACKSON, et al.,

Appellants,

-against-

STATE OF CONNECTICUT,

Appellee.

Docket No. 76-2108

B
B/S

APPENDIX TO APPELLANTS' BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellants
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

DAVID J. GOTTLIEB,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

INDEX TO THE APPENDIX

205-3	N 76-219	06	2[illegible]	76	3	530	1				0508 JON		N 76-219 A

PLAINTIFFS

RONALD JACKSON, MELVIN JONES, DOUGLAS THOMAS, JOHN KOHLER, LINDSEY JOHNSON, and BRUCE ROGERS

DEFENDANTS

STATE OF CONNECTICUT

CAUSE Petition for writ of habeas corpus

Ronald Jackson - #13920
Melvin Jones P.O. Box 100
Douglas Thomas Somers, Conn.
John Kohler 06017
Lindsey Johnson
Bruce Rogers
Community Correctional Center
245 Whalley Avenue
New Haven, Conn. 06511

ATTORNEYS

Arnold Markle, State's Attorney
Superior Court
235 Church Street
New Haven, Connecticut

FILED
SEP 15 1976
A. RAPHAEL FUSARO, CLERK
[illegible] CIRCUIT

X CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				JS 5	
				JS 6	A

DATE 1976	NR.	PROCEEDINGS
6/30	1	Memorandum of Decision, entered. "***. Even assuming that petitioners have exhausted their state judicial remedies, a fact not evident from their papers, this Court lacks jurisdiction to hear the claim that the state courts have erred in their construction and application of the state law in their cases. ***." The petition is dismissed for lack of jurisdiction. The papers may be filed without fee. Newman, J. Copies mailed to petitioners and to State's Atty Markle. M-7/1/76
"	2	Petition for Writ of Habeas Corpus, filed.
7/1	3	Judgment entered dismissing action. Markowski, C. M-7/1/76 Copies mailed to Petitioners and State's Attorney Markle.
8/2	4	Amended Motion for Re-Consideration, filed by Petitioner Ronald Jackson. Order endorsed thereon DENYING same. Newman, J. M-8/2/76 Copies to Petitioner, State's Attorney, and Atty General.
8/5	5	Notice of Appeal filed by plaintiff.
8/10	6	Motion to proceed as poor person in filing appeal filed and endorsement entered thereon: "Leave to appeal in forma pauperis granted" Newman, J. M-8/10/76. copies mailed. Copy of appeal mailed to U.S.C.A with copy of docket entries. Copies mailed to all counsel of record.
8/30	7	Motion for Certificate of Probable Cause and Motion to proce as poor person filed by plaintiff.
9/3		Endorsement entered on motion for certificate of probable cause as follows: "Motion Granted" Newman, J. M-9/3/76. copies maile
"		Endorsement entered on motion to proceed as poor person as follows: "Leave to appeal in forma pauperis Granted" Newman, J. M-9/3/76. copies mailed.

B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

RONALD JACKSON, MELVIN JONES, DOUGLAS THOMAS, JOHN KOHLER, LINDSEY JOHNSON, and BRUCE ROGERS	:	N 76-219
V.	:	CIVIL NO. _____
STATE OF CONNECTICUT	:	

MEMORANDUM OF DECISION

Petitioners, state pre-trial detainees, complain that they have not been provided the bail hearing required by Conn. Gen. Stat. § 54-53(a). Even assuming that petitioners have exhausted their state judicial remedies, a fact not evident from their papers, this Court lacks jurisdiction to hear the claim that the state courts have erred in their construction and application of the state law in their cases. Howard v. Kentucky, 200 U.S. 164, 172-73 (1906); United States v. Fay, 284 F.2d 426, 427 (2d Cir. 1960); 28 U.S.C. §§ 2241 and 2254. There is no claim that the bail set in petitioners' cases is so excessive as to violate the Constitution. Cf. United States ex rel. Goodman v. Kehl, 456 F.2d 863 (2d Cir. 1972).

Howard v. Kentucky, 200 U.S. 164, 172-73 (1906); United States v. Fay, 284 F.2d 426, 427 (2d Cir. 1960); 28 U.S.C. §§ 2241 and 2254. There is no claim that the bail set in petitioners' cases is so excessive as to violate the Constitution. Cf. United States ex rel. Goodman v. Kehl, 456 F.2d 863 (2d Cir. 1972).

Petitioner Johnson makes an additional complaint concerning developments in the case now pending against him, but those matters have clearly not been reviewed by the State Supreme Court and presumably cannot be except by appeal from a judgment of conviction.

Accordingly, the petition is dismissed for lack of jurisdiction. The papers may be filed without fee.

Dated at New Haven, Connecticut, this 30 day of June, 1976.

Jon O. Newman
United States District Judge

FILED

JUN 21 2 53 PM '76

U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

APRIL 18, 1976

RONALD JACKSON, #13920
MELVIN JONES, #55851
DOUGLAS THOMAS, #13088
JOHN KOHLER, #43117
Bruce Rogers, #13738
Lindsey Johnson,

: CASE NO. N-76-219

: APPLICATION FOR WRIT OF HABEAS-CORPUS

: JURISDICTION, 28 U.S.C. 2254, sub-sec. 1, 2, 3, 6, 7.

We, the above named plaintiffs hereby give notice of individual exhaustion of all State Court remedies as outlined in 28 U.S.C. 2254, sub. sec. 1,2,3,6,7, and now petition this Honorable Court to protect the plaintiff's 8th and 14th Amendments rights as afforded to us by the United States Constitution, ie, Bail and Due Process of the law.

Plaintiffs have filed separate pre-trial motions in Superior Court for dismissal of our cases for the State of Connecticut, County of New Haven, failure to present each plaintiff for a bond hearing after the initial forty-five day period. By virtue of the fact that the General Statute of Connecticut, 54-53(a) leaves the burden on the Court having cogizance to bring the defendant to the first bond hearing, and each successive one such person may again by motion be presented, the Court in this cause has failed to adhere to the provisions of General Statute of Connecticut, 54-53(a), therefore ignoring the legislative intent.

Plaintiffs have also filled appeals as directly outlined for expeditious review which shall have precedence over any other matter before said appellate division or supreme court" as outlined in Gen. Statute, 54-63(g).

The State Supreme Court has been "dragging its feet" in the review of this bail matter in the anticipation that our criminal cases will be either brought to trial or disposed of by a guilty plea, thereby making the bail issue moot.

Since the same bail issue has been similarly raised by Joseph-Mario Spates, Jr. in his review to the State Supreme Court and he was denied the relief prayed for on April 7, 1976, the plaintiffs feel as though a deliberate attempt to violate our 8th and 14th Amendment to the United States Constitution by the State of Connecticut is being done.

WHEREFORE, the Plaintiff respectfully request this Honorable Court to hear our appeal, and grant relief prayed for by discharge of our cases because of the State of Connecticut failure to give us Due Process and denial of bail hearing as was the legislative intent. "Bail is a constitutional right, one which the judiciary must honor in all criminal cases." "Release on bond is a concomitant of the presumption of innocence." "Refusal of freedom in violation of the mandate of our organic law would constitute punishment before conviction, a notion abhorrent to our democratic system".

The question before this Honorable Court is:"The legislature intent regarding Statute, 54-53(a)". With due respect to the judicial department of the State of Connecticut questions before any Superior or Supreme Court is never what legislature actually intended, but what intention it expressed.

PLAINTIFFS,

John Kohler
John Kohler

Lindsey Johnson
Lindsey Johnson

Bruce Rogers
Bruce Rogers

Ronald Jackson
Ronald Jackson

Melvin Jones
Melvin Jones

Douglas Thomas
Douglas Thomas

SERVICE OF COPIES

State Supreme Court
Clerk of Court
90 Washington St.
Hartford, Conn.

Clerk of Court
Superior Court
235 Church Street
New Haven, Conn.

States Attorney
Superior Court
235 Church St.
New Haven, Conn.

Plaintiffs also request that all files and Court documents be forwarded to the United States District Court, District of Connecticut, New Haven, Conn.

MOTION FOR ASSIGNMENT OF LAWYER

Plaintiffs herein requests this Honorable Court for assistant of counsel in order that they can perfect the NOTICE OF APPEAL, Application for Writ of Habeas-Corpus, Jurisdiction, 28 U.S.C. 2254, sub-sec. 1,2,3, 6,7.

LEAVE TO PROCEED IN FORM PAUPERIS

The Plaintiff enter this Honorable Court pursuant to 28 U.S.C. Sec. 1915.

THIS WRIT IS BEING FINGERPRINTED BECAUSE OF THE UNAVAILABILITY OF NOTARY. PLEASE EXCUSE.

State of Connecticut

No. 20739

State of Connecticut — Superior Court

vs. — New Haven County

Ronald Jackson — September 15, 1976

Present, Hon. Robert J.Callahan, Judge.

JUDGMENT.

D

Judgment of Guilty of the charge of VSNDA 19-480 (a) entered September 15, 1976 by the Court (Callahan, J.) after a plea of Guilty to said charge.

Sentence imposed of not less than five, nor more than ten years in the Correctional Institution, Somers, to run concurrent with file No. 20220, and to run consecutive with file No. 20747 which he is now serving.

By the Court (Callahan, J.)

Leonard J. Gilhuly

Assistant Clerk.

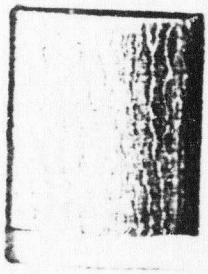
STATE OF CONNECTICUT
NEW HAVEN COUNTY
SUPERIOR COURT

I, Nicholas J. Cimmino, deputy court administrator and clerk of the Superior Court within and for New Haven County, in the State of Connecticut, and keeper of the records and seal thereof, hereby certify that the above and foregoing is a true copy of the judgment rendered by this Court (Callahan, J.) on September 15, 1976, as on file in the records of this Court in the case of #20789, State of Connecticut vs. Ronald Jackson.

In testimony whereof I hereunto set my hand and affix the seal of said court, at New Haven, in said county, this 19th day of October, 19 76.

Nicholas J. Cimmino Clerk.

D 3104



State of Connecticut

No. 20153

State of Connecticut — Superior Court

vs. — New Haven County

Melvin Jones — October 1, 1976

Present, Hon. Robert J. Callahan, Judge.

JUDGMENT.

Judgment of Guilty of the charge of Murder, P.A. 74-186, Sec. 11 entered October 1, 1976 by the Court (Callahan, J.) after a plea of Guilty to said charge.

Sentence imposed of not less than eighteen years, nor more than life in the Correctional Institution, Somers.

By the Court (Callahan, J.)

Robert J. O'Brien
Assistant Clerk.

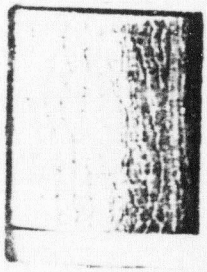
STATE OF CONNECTICUT
NEW HAVEN COUNTY
SUPERIOR COURT

I, Nicholas J. Cimmino, deputy court administrator and clerk of the Superior Court within and for New Haven County, in the State of Connecticut, and keeper of the records and seal thereof, hereby certify that the above and foregoing is a true copy of the judgment rendered by this Court (Callahan, J.) on October 1, 1976, as on file in the records of this Court in the case of #20153, State of Connecticut vs. Melvin Jones.

In testimony whereof I hereunto set my hand and affix the seal of said court, at New Haven, in said county, this 19th day of October, 1976.

Nicholas J. Cimmino Clerk.

JD 3104



State of Connecticut

No. 18928

State of Connecticut — Superior Court

vs. — New Haven County

John G. Kohler — July 2, 1976

Present, Hon. Angelo J. Santaniello, Judge.

JUDGMENT.

Judgment of Guilty of the charges of Risk of Injury (count 3) and Carrying dangerous weapon without permit (count 7), entered July 2, 1976 by the Court (Santaniello, J.) after a plea of Guilty to said charges.

Sentence imposed of not less than two, nor more than five years on the third count, in the Correctional Institution, Somers, and on the seventh count, not less than one, nor more than two years in the Correctional Institution, Somers, to run consecutively with file No. 19089, making a total effective sentence of not less than three, nor more than seven years.

By the Court (Santaniello, J.)

Robert J. O'Brien

Assistant Clerk.

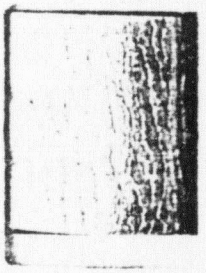
STATE OF CONNECTICUT
NEW HAVEN COUNTY
SUPERIOR COURT

I, Nicholas J. Cimmino, deputy court administrator and clerk of the Superior Court within and for New Haven County, in the State of Connecticut, and keeper of the records and seal thereof, hereby certify that the above and foregoing is a true copy of the judgment rendered by this Court (Santaniello, J.) on July 2, 1976, as on file in the records of this Court in the case of #13928, State of Connecticut vs. John G. Kohler.

In testimony whereof I hereunto set my hand and affix the seal of said court, at New Haven, in said county, this 19th day of October, 19 76.

Nicholas J. Cimmino Clerk.

JD 3104



State of Connecticut

No. 19089

State of Connecticut — Superior Court

vs. — New Haven County

John Kohler — July 2, 1976

Present, Hon. Angelo J. Santaniello, Judge.

JUDGMENT

Judgment of Guilty of the charge of Escape from Correctional Center entered July 2, 1976 by the Court (Santaniello, J.) after a plea of Guilty to said charge.

Sentence imposed of not less than one, nor more than two years in the Correctional Institution, Somers, to run consecutive with file #18928.

By the Court (Santaniello, J.)

Robert J. O'Brien
Assistant Clerk.

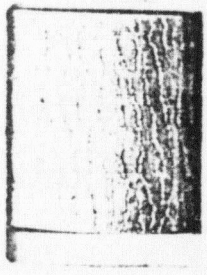
STATE OF CONNECTICUT
NEW HAVEN COUNTY
SUPERIOF COURT

I, Nicholas J. Cimmino, deputy court administrator and clerk of the Superior Court within and for New Haven County, in the State of Connecticut, and keeper of the records and seal thereof, hereby certify that the above and foregoing is a true copy of the judgment rendered by this Court (Santaniello, J.) on July 2, 1976, as on file in the records of this Court in the case of #19039, Stateof Connecticut vs. John Kohler.

In testimony whereof I hereunto set my hand and affix the seal of said court, at New Haven, in said county, this 19th day of October, 19 76.

Nicholas J. Cimmino Clerk.

JD 3104



State of Connecticut

No. 21141

State of Connecticut — Superior Court

vs. — New Haven County

Douglas Thomas — July 2, 1976

Present, Hon. Francis J. O'Brien, Judge.

JUDGMENT.

Judgment of Guilty of the charge of Kidnapping entered July 2, 1976 by the Court (O'Brien, J.) after a plea of Guilty to said charge.

Sentence imposed of not less than seven, nor more than fourteen years in the Correctional Institution, Somers, to run concurrent with files Nos. 20586, 20589, 20957, making a total effective sentence of not less than seven, nor more than fourteen years.

By the Court (O'Brien, J.)

Francis J. O'Brien

Assistant Clerk.

G

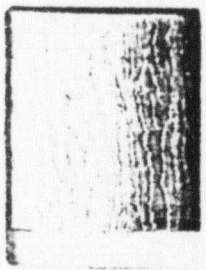
STATE OF CONNECTICUT
NEW HAVEN COUNTY
SUPERIOR COURT

I, Nicholas J. Cimmino, deputy court administrator and clerk of the Superior Court within and for New Haven County, in the State of Connecticut, and keeper of the records and seal thereof, hereby certify that the above and foregoing is a true copy of the judgment rendered by this Court (O'Brien, J.) on July 2, 1976, as on file in the records of this Court in the case of #21141, State of Connecticut vs. Douglas Thomas.

In testimony whereof I hereunto set my hand and affix the seal of said court, at New Haven, in said county, this 19th day of October, 19 76.

Nicholas J. Cimmino Clerk.

JD 3104



State of Connecticut

No. 20957

State of Connecticut — Superior Court

vs. — New Haven County

Douglas Thomas — July 2, 1976

Present, Hon. Francis J. O'Brien, Judge.

JUDGMENT.

Judgment of Guilty of the charge of Attempted Burglary, entered July 2, 1976 by the Court (O'Brien, J.) after a plea of Guilty to said charge.

SEntence imposed of not less than one, nor more than five years in the Correctional Institution, Somers, to run concurrent with file Nos. 20586, 20589, 21141, making a total effective sentence of not less than seven, nor more than fourteen years in the Correctional Institution, Somers.

By the Court (O'Brien, J.)

Robert J. O'Brien

Assistant Clerk.

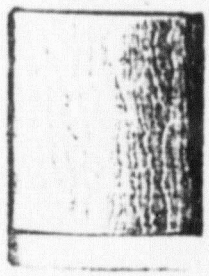
STATE OF CONNECTICUT
NEW HAVEN COUNTY
SUPERIOR COURT

I, Nicholas J. Cimmino, deputy court administrator and clerk of the Superior Court within and for New Haven County, in the State of Connecticut, and keeper of the records and seal thereof, hereby certify that the above and foregoing is a true copy of the Judgment rendered by this Court (O'Brien, J.) on July 2, 1976, as on file in the records of this Court in the case of #20057, State of Connecticut vs. Douglas Thomas.

In testimony whereof I hereunto set my hand and affix the seal of said court, at New Haven, in said county, this 19th day of October, 19 76.

Nicholas J. Cimmino Clerk.

JD 3104



312,519

STATE OF CONNECTICUT

AT A CRIMINAL SESSION OF THE SUPERIOR COURT HELD AT WATERBURY, WITHIN AND FOR THE JUDICIAL DISTRICT OF WATERBURY, ON THE TWENTY-NINTH DAY OF JUNE, A.D., 1976.

Present Hon. Irving Levine Judge

STATE OF CONNECTICUT

vs

BRUCE RODGERS

JUDGMENT

Upon an information dated January 27, 1976, of Bradford J. Ward, Assistant State's Attorney for the County of New Haven, at Waterbury, to the Superior Court having criminal jurisdiction, held at Waterbury, charging Bruce Rodgers of Waterbury with the crimes of Robbery in the 1st Degree in violation of Sec. 53a-134 of the General Statutes at Waterbury on December 7, 1975; Kidnapping in the 1st Degree in violation of Sec. 53a-92 of the General Statutes at Waterbury on December 7, 1975; and Threatening in violation of Sec. 53a-62 of the General Statutes at Waterbury on December 7, 1975, the said Bruce Rodgers appeared on February 4, 1976, and said action came thence to February 26, 1976, when the Defendant was found competent to stand trial after a hearing on Defendant's Motion for Hearing on Competency pursuant to Sec. 54-40 of the General Statutes as amended, at which time the Defendant entered a plea of Not Guilty to the 1st and 3rd counts of said Information and an election of trial by Jury was made, and thence to further on said date when the Defendant entered a written plea of

Not Guilty by Reason of Insanity, and thence to June 17, 1976, when the Defendant withdrew all prior pleas and elections and entered a plea of Guilty to Robbery in the 1st Degree only, at which time the Court entered a Finding of Guilty and said action was continued to June 29, 1976, for an Adult Probation Report and for sentencing, at which time the Defendant appeared before the Court for sentence.

Whereupon It Is Adjudged that the Defendant, Bruce Rodgers, be sentenced to the custody of the Commissioner of Correction, at Somers, for a term of Not Less than Three (3) Years Nor More than Seven (7) Years on the count of Robbery in the 1st Degree and Nolle be entered upon the request of the State's Attorney as to the Second and Third counts in said Information, and the Motion for Return of Property be Granted.

Date of Warrant
January 27, 1976
Date of Judgment
June 29, 1976

By the Court,

s/ Francis J. Butler

Clerk of Superior Court for the
Judicial District of Waterbury

State of Connecticut }
County of New Haven } ss. Waterbury

CLERK'S OFFICE

I, Joseph W. Doherty ~~Francis J. Bailey, Clerk, Certified Copy~~, Assistant Clerk, of the Superior Court at Waterbury, within and for the County of New Haven, in the State of Connecticut, and keeper of the records and seal thereof, do hereby certify that the above and foregoing copy is a true copy of the judgment file in the case of #12,519 STATE OF CONNECTICUT vs. BRUCE RODGERS, dated June 29, 1976.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at Waterbury, this 25th day of October, 1976.

Joseph W. Doherty
Assistant Clerk at Waterbury.

JD 3098 CSP

SUPERIOR COURT

New Haven County

STATE vs. Lindsay B. Johnson NO 20875

Age: Date of birth: Conspiracy Nos.

Jan. Term, 1976

DATE:

9/76 Bench warrant issued. Bond: $100,000.00

Bench warrant returned. Advice of rights

Bindover received from Circuit Docket no. CR

Bond posted: $ Other release:

Surety: Bond forfeited. (See other side)

Counsel appeared. Name: PA Norbert Schiff

Guardian appointed. Name:

1-27-76 Plea to 1st count: NG Election:

2nd count: NG

3rd count: NG

4th count: NG

5th count:

Change of plea to counts

Substitute information filed. Plea of guilty to counts

Nolle by state's attorney: (Charge-statute section)

1st count:

2nd count:

3rd count:

4th count:

5th count:

DATE:

10-1-76 Trial began before BURNS, J. and jury of

11-2-76 Trial ended. Verdict or finding:

Guilty to counts 1-2-3-4

Not guilty: (Charge-statute section)

1st count:

2nd count:

3rd count:

4th count:

5th count:

Mistrial declared.

Pre-sentence investigation ordered for Nov. 24 1976 (Date of sentence)

Sentence-judgment (Include charge-statute section.) BURNS, J.

1st count: Criminal Sttempt to commit murder 53a-54(a), 53a-49, 53a-8

2nd count: Kidnapping, 2nd deg. 53a-94, 53a-8

3rd count: Robbery, 1st deg., Sec. 1(a)(2) & 1(a)(3) P.A. #75-411

4th count: Sexual Assault, 1st deg. Sec. 3 P.A. 75-619, 53a-8

5th count:

1

....., Clerk.

ADDITIONAL FILE ENTRIES

1) 1-20-76 [illegible]
2) 1-20-76 Motion to appoint [illegible]
1-20-76 [illegible]
3) 1-21-76 [illegible]
4) 2-11-76 Motion to Suppress
10-12-76 DENIED BY BURNS, J.
5) 2-11-76 Motion to Suppress Identification
10-12-76 DENIED BY BURNS, J.
6) 2-11-76 Motion to Produce Photographs
7) 2-11-76 Motion for Production of [illegible]
8) 2-27-76 Motion for Discovery
2-26-76 Order [illegible]
9) 2-11-76 Motion for Bill of Particulars filed
2-26-76 [illegible]
10) 3-4-76 Bill of Particulars [illegible]
11) 3-4-76 Discovery filed
12) [illegible] Motion for Discharge [illegible] Denied by [illegible]
13) 3/18/76 Mot. for Bond Reduction
3-26-76 [illegible] Bond 20,000
14) 3-9-76 Motion for [illegible]
5-4-76 [illegible]
15) 5-12-76 State's Supplemental Discovery filed
16) 6/24/76 Mot. for Bond Reduction
16) 6-30-76 [illegible]
17) 9-1-76 MOTION FOR SEPERATE TRIAL, FILED
9-1-76 MOTION FOR SEPERATE TRIAL, WITHDRAWN

Bond Collected Date

BEST COPY AVAILABLE

18) 9-2-76 MOTION FOR TRIAL TO THE COURT, FILED
9-2-76 GRANTED BY BURNS J.

Bond Compromised Date: Amount $

18) 9-2-76 MOTION FOR TRIAL TO THE COURT, FILED
9-2-76 GRANTED BY BURNS, J.

19) 9-8-76 MOTION FOR APPOINTMENT OF A PRIVATE INVESTIGATOR, FILED

20) 10-1-76 MOTION FOR JURY TRIAL, FILED

21) 10-15-76 DEFT'S (ATTY SCOTT) MOTION TO WITHDRAW APPEARANCE FILED
10-17-76 DENIED BY BURNS, J.

22) 10-19-76 MOTION FOR MISTRIAL, DATED 10-15-76, FILED
10-19-76 DENIED BY BURNS, J.

23) 10-19-76 MOTION FOR MISTRIAL, DATED 10-19-76, FILED

24) 10-27-76 STATE'S REQUEST TO CHARGE FILED

25) 10-29-76 DEFT'S REQUEST TO CHARGE FILED

11-2-76 BOND ORDERED INCREASED FROM $50,000.00 TO $100,000.00
BY BURNS, J. (ON ORAL MOTION)

26) [illegible]

dealt with according to law.

STATE OF CONNECTICUT

VS. :

LINDSAY F. JOHNSON : [illegible], 1976

MOTION FOR DISCHARGE OF CASE

COMES, now, Lindsay F. Johnson, the Defendant in the above styled cause, and presents this his Motion for Discharge of Case, for this Honorable Court to examine and rule upon to-wit:

STATEMENT OF FACTS

The Defendant was arrested, brought to Arraignment issued by Stamford Superior Court and his case was called, and transferred over to the Superior Court at New Haven on January 6, 1976. Defendant is not charged with a crime punishable by death. Defendant has been held on a bail set by the said Court since January 6, 1976.

Since that time the Defendant has not been brought before this Court having cognizance of the offense for any type of bond hearing as required by General Statute of Connecticut, Section, 54-53(a). This is a clear violation in that more than the required forty-five day period has passed.

By virtue of the fact that the General Statute of Connecticut, 54-53(a) leaves the burden on the Court having cognizance to bring the Defendant to the first bond hearing, and each successive one such person may again by motion be requested, the Court in this cause has failed to adhere to the provisions of General Statute of Connecticut, 54-53(a), therefore the Defendant moves this Court to discharge the above styled cause by granting this motion.

Respectfully submitted,

Lindsay F. Johnson
Pro-Se
[illegible] Bailey Ave.
New Haven, Conn.

3/17/76

NEW HAVEN COUNTY
SUPERIOR COURT
FILED
MAR 17 1976
ROBERT J. O'BRIEN
ASST. CLERK

12

[illegible] family can raise the money to provide a [illegible] bond in this matter.

STATE OF CONNECTICUT | SUPERIOR COURT

VS. | NEW HAVEN COUNTY

LINDSEY JOHNSON | MARCH 17, 1976

MOTION FOR BOND REDUCTION

The Defendant in the above matter represents that:

1. He was arrested without a warrant in South Norwalk Connecticut on December 21, 1975, and returned to this court for arraignment on January 6, 1976, charges of criminal attempt to commit murder, sexual assualt 1st, kidnapping 2nd, and robbery 1st, at which time Bond was set at $100,000.

2. At the time of his arrest, he was living with his wife at 85 Union Avenue, Bridgeport, Connecticut.

3. That as of the date of this Motion he is still confined in lieu of bond at the Connecticut Correctional Center on Whalley Avenue, unable to post the $100,000. bond set by the Court.

4. That if released on bond, he will appear in Court when called upon.

5. That the bond in the amount of $100,000. is grossly excessive in that it is far beyond the defendant's capabilities to make.

6. That he lived in the New Haven Area for almost eight years and graduated from High School in Ohio in 1968.

7. That he has always appeared in court when called upon to do so.

8. That there is no way possible that his wife or his family can raise the money to provide a substantial bond in this matter.

9. That accordingly a bond in the amount of $25,000.00 is more than sufficient to guaranty the defendant's appearance in court.

WHEREFORE the defendant moves that the bond in the present matter be reduced to $25,000.00

The Defendant

By: Herbert R. Scott
His Attorney
152 Temple Street
New Haven, Connecticut

3/25/76

O R D E R

The foregoing motion having been heard, it is hereby ORDERED: Bond reduced to $50,000

By the Court

_____, J.

Service certified per P.B.

Herbert R. Scott

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CONNECTICUT LAW JOURNAL

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CONNECTICUT REPORTS

SUPREME COURT

March Term, 1976

NAPIER TALTON *v.* WARDEN, CONNECTICUT CORRECTIONAL INSTITUTION, SOMERS

Habeas corpus alleging unlawful imprisonment, brought to the Superior Court in Hartford County and tried to *John F. Shea, J.*; judgment denying the petition, from which the plaintiff appealed to this court. *No error.*

John R. Williams, for the appellant (plaintiff).

Ernest J. Dietter, Jr., assistant state's attorney, with whom, on the brief, was *Arnold Markle*, state's attorney, for the appellee (defendant).

LOISELLE, J. The plaintiff, Napier Talton, filed a petition for a writ of habeas corpus claiming that he was confined in the Connecticut correctional institution at Somers without law or right because, among other reasons, he was denied due process at his trial when, at a critical point, the court proceeded with the trial in his absence. The plaintiff has appealed from the judgment denying the petition.

The court found that, after a trial to the court, the plaintiff was convicted of manslaughter in the first degree and that he was sentenced to a term in the state prison. During the trial proceedings, the state's attorney offered as evidence a written statement, signed by the plaintiff, in which the plaintiff confessed to killing Marsha Layne. The statement was a transcription of a tape recording containing a New Haven police detective's interrogation of the plaintiff. The plaintiff's trial counsel said he would not object to the introduction into evidence of the signed, written statement if he had an opportunity to hear the tape recording. The court recessed and reconvened in chambers where the tapes were played in the presence of the judge,

SUPREME COURT

May Term, 1976

STATE OF CONNECTICUT *v.* MARK CASEY OLDS

Information charging the defendant with the mes of robbery in the first degree, unlawful straint in the first degree, and assault in the cond degree, brought to the Superior Court in ew Haven County and tried to the jury before *ogal, J.*; verdict and judgment of guilty of rob ery in the second degree, unlawful restraint in the cond degree, and assault in the third degree, and peal by the defendant to this court. *No error.*

John R. Williams, special public defender, for the pellant (defendant).

Ernest J. Dietter, Jr., assistant state's attorney, ith whom, on the brief, was *Arnold Markle*, state's ttorney, for the appellee (state).

BARBER, J. The defendant was tried to a jury of x on a three-count information charging him with obbery in the first degree, in violation of § 53a-134 a) (2) of the General Statutes, unlawful restraint the first degree, in violation of § 53a-95, and ssault in the second degree, in violation of § 53a-60 a) (2). He was found guilty of the lesser included ffenses of robbery in the second degree, unlawful estraint in the second degree, and assault in the hird degree. On appeal, he has raised seven issues, laiming that the court erred (1) in denying a notion, based upon an alleged withholding of exculatory evidence by the state, for a mistrial or continuance; (2) in its charge to the jury on the failure f a party to call a witness; (3) in denying a motion o dismiss based upon a claim that the defendant ad been illegally incarcerated before trial; (4) in enying the defendant his alleged right to be resent during certain stages of the proceedings; 5) in denying a motion to dismiss based upon an llegation that the defendant's mail had been legally opened while he was in jail pending trial; 6) in denying a motion to dismiss the jury panel ased upon a claim that the Connecticut jury selecon statutes are unconstitutional; and (7) in denyng the defendant his alleged right to trial by a jury f twelve.

I

A brief discussion of the evidence presented at claim that the state withheld exculpatory evidence.[1] The state offered evidence to prove that on August 24, 1973, the defendant and an unidentified companion, armed with shotguns, entered the New Haven apartment of Harry Coe, bound and gagged Coe, took $471 in cash as well as assorted jewelry, and then beat Coe into a state of unconsciousness. The state's case rested primarily upon the testimony of Coe, who testified that on the night of August 24, 1973, he was speaking to a girl friend on the telephone when he heard a knock at his door. He opened the door and two men armed with shotguns forced their way into his apartment. Coe testified that he did not know either of the two men, although he recognized one of them, the defendant, as a man he had seen before. Coe identified the defendant in the courtroom and then described the robbery and beating. He further testified that upon regaining consciousness he returned to the telephone and his girl friend was still on the line.

The defendant did not dispute Coe's testimony that he had been beaten and robbed but did claim that Coe's identification was incorrect. The defendant attempted to prove that Coe was a professional gambler and that his assailants were either Coe's business associates or his friends. Coe's credibility was thus a critical issue at trial.

Before trial, the defendant had moved for disclosure by the state of "[t]he felony record of the victim or any witness or any other information that may be used in a court of law to throw doubt upon the credibility of any victim or witness." The state responded to this motion by stating that the felony record of any witness would be made available after the witness had testified. During trial, after the state had rested, the defendant moved for production by the state of any statement in its file made by a witness who had not been called to testify. The defendant commented that any such statement would presumably be exculpatory. The trial court examined the state's file in camera and then, saying it was "bending over backwards," requested the state to give the defendant a copy of a statement given by Sandra Adams, Coe's girl friend, who had been on the telephone during the robbery.

[1] It should be noted that the defendant's counsel, a special public defender, has not followed our rules of appellate procedure, which require the appellant to include in his brief a statement of facts in narrative form, supported by references to appropriate pages of the trial transcript. Practice Book § 631A. The defendant has instead printed, at state expense, an appendix, 164 pages in length, consisting almost entirely of verbatim testimony. Since our rules also require the appellant to file a copy of the trial transcript, Practice Book § 63A; the appendix is merely repetitious and serves no useful purpose. Such a deviation from our rules of practice unnecessarily burdens an orderly appellate review. Cf. *State* v.

The statement by Miss Adams is in the form of an affidavit and consists of a transcript of questions asked her by a detective and her responses. The statement indicates that on August 24, 1973, Miss Adams was talking on the telephone with Coe when Coe said he had to answer a knock at the door. She remained waiting on the telephone for about fifteen minutes until Coe returned and informed her that he had been robbed. During the fifteen minute interval, she heard movements but no sounds of a struggle. When asked if Coe sounded as if he knew the individuals who came into the apartment, she replied, "I would say yes." The defendant argued that the statement was exculpatory in that Miss Adams' statement that Coe sounded as if he knew the men who came into the apartment contradicted Coe's testimony that the two men were strangers to him. The defendant, therefore, moved for a continuance which would enable him to subpoena Miss Adams, who was in the service in California, or, in the alternative, for a mistrial based upon the state's failure to produce the statement in response to the motion for disclosure of "information that may be used in a court of law to throw doubt upon the credibility of any victim or witness." The court ruled that neither a continuance nor a mistrial would be appropriate and the defendant took an exception.

On appeal, the defendant has vociferously pursued his contention that the nondisclosure by the state of Miss Adams' statement constituted a suppression of material evidence favorable to the accused. He further argues that the nondisclosure resulted from "bad faith" on the part of the state's attorney. His argument rests in large part on the holding in *Brady* v. *Maryland*, 373 U.S. 83, 86, 83 S. Ct. 1194, 10 L. Ed. 2d 215, that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." We are not persuaded, however, that the *Brady* principle is applicable to the present case. "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." *Moore* v. *Illinois*, 408 U.S. 786, 794-95, 92 S. Ct. 2562, 33 L. Ed. 2d 706; see *State* v. *Monahan*, 164 Conn. 560, 592, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S. Ct. 291, 38 L. Ed. 2d 219. The statement was not "suppressed," as that term is used in *Brady*, since it was in fact made available to the defendant during the course of trial. Nor may the statement be fairly characterized as "favorable" to the defendant; the limited information it contains is, for the most part, consistent with and supportive of Coe's testimony. The one major inconsistency, Miss Adams' remark that she "would say" it sounded as if Coe knew the persons who entered the apartment, was, as the trial court observed, of doubtful admissibility. Finally, the defendant does not claim that the statement itself is either exculpatory or material, but argues that if the statement had been disclosed, he would have been able to contact Miss Adams, bring her back from California, and, by her testimony, have been able to damage Coe's credibility. The trial court, having deliberately assessed the potential impact of Miss Adams' statement, determined that no sanction, other than disclosure of the information to the defendant, was necessary. See ABA Standards of Discovery and Procedure Before Trial § 4.7 (approved draft, 1970).

Under the circumstances, the court did not abuse its discretion in denying the defendant's motion for a mistrial or a continuance to enable Sandra Adams to be returned to Connecticut. The denial of a motion for a mistrial is a matter within the sound discretion of the trial court. *State* v. *Grayton*, 163 Conn. 104, 112, 302 A.2d 246, cert. denied, 409 U.S. 1045, 93 S. Ct. 542, 34 L. Ed. 2d 495. "The general principle is that a mistrial should be granted only as a result of some occurrence on the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial." *State* v. *Bausman*, 162 Conn. 308, 312, 294 A.2d 312. Even after a trial has concluded, a new trial is not automatically required whenever "a combing of the prosecutors' files . . . has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." *United States* v. *Keogh*, 391 F.2d 138, 148 (2d Cir.). A new trial is required only when there is a reasonable likelihood that the material or information would have affected the verdict. *Giglio* v. *United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104. In this case, there was no omission which deprived the defendant of a fair trial. *United States* v. *Agurs*, U.S. , , 96 S. Ct. 2392, L. Ed. 2d .

Nor did the court abuse its discretion in denying the motion for a continuance for a period of weeks. The matter of a continuance, like a motion for a mistrial, is also a matter traditionally within the discretion of the trial judge. *State* v. *Bethea*, 167 Conn. 80, 86-87, 355 A.2d 6. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The

answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921.

II

In its charge, the court instructed the jury that an adverse inference could be drawn from the failure of the state to call Sandra Adams as a witness, if the jury found that she was both available and a witness whom the state would naturally produce. The court commented further that in determining whether Sandra Adams was a witness whom the state would "naturally produce," the jury were to consider whether her testimony would, as the state had argued, have been merely cumulative. In excepting to this portion of the charge, the defendant makes no claim that it is not an accurate statement of the law pertaining to missing witnesses, as set out in *State v. Brown*, — Conn. — (37 Conn. L.J., No. 24, pp. 7, 10-11) and *Secondino v. New Haven Gas Co.*, 147 Conn. 672, 675, 165 A.2d 598. He does claim, however, that the instructions were misleading because the court "knew" that Miss Adams' testimony, if offered, would not have been merely cumulative, and the court also "knew" that her unavailability was the result of "prosecutorial misconduct."

"The test to be applied to any part of a charge is whether the charge considered as a whole presents the case to the jury so that no injustice will result." *State v. Mullings*, 166 Conn. 268, 275, 348 A.2d 645; *State v. Annunziato*, — Conn. — (37 Conn. L.J., No. 12, pp. 9, 14). A party claiming the benefit of an adverse inference must show that he is entitled to it. *State v. Rosa*, — Conn. — (37 Conn. L.J., No. 39, pp. 1, 5). In the light of the facts and circumstances discussed in part I of this opinion, the defendant's claim of error in the charge to the jury is without merit.

III

Before the case was submitted to the jury, the court denied a motion that the information be dismissed, and the defendant has included that denial in a motion in arrest of judgment. See Practice Book § 600; Maltbie, Conn. App. Proc. § 209. The defendant's motion to dismiss alleges that after being bound over to the Superior Court he was held in a correctional center in excess of 45 days without being presented in court, in violation of § 54-53a of the General Statutes.[3] The parties stipulated that April 4, 1974, was the last time the defendant appeared in the Circuit Court before being bound over to the Superior Court, that he first appeared in the Superior Court on June 25, 1974, requesting a change of counsel, that the case was set down for a plea on June 28, 1974, and that a plea was taken on July 2, 1974.

The right to be released on bail upon sufficient security is a fundamental constitutional right, and any order made by the trial court denying or fixing the amount of bail is subject to appellate review. Conn. Const., art. I § 8; Practice Book § 694. On the other hand, § 54-53a only purports to mandate the procedure for implementing this right and provides no sanction in the event there is a violation. The denial of any right under the statute does not involve a fundamental constitutional right, and the defendant has made no showing of prejudice which would entitle him to a dismissal of the information. On July 2, 1974, the defendant filed a motion requesting that he be released without bail or, in the alternative, that his bail be fixed at $2500. The motion was denied and on the same day he entered a plea of not guilty. It was not until August 22, 1974, that the defendant filed the motion to dismiss. It does not appear that the defendant at any previous time requested that the amount of his bail be reviewed. The court did not err in denying the motion to dismiss.

IV

After motions for reduction of bail and for discovery had been filed by the defendant and decided by the court, as well as a plea entered, and after a lapse of more than ten days ordered by the court for filing preliminary motions, new counsel for the defendant entered the case and filed several pretrial motions, among them motions to quash, for production, for trial by a jury of twelve, and a motion to reduce bond. A request to have the defendant brought into court when these motions were argued was denied. No evidence was taken by the court, nor was any cogent reason advanced in support of the request other than that the defendant had requested it.

The question of a defendant's right to be present during a discussion of questions of law is one of first impression in this state. As a general rule, an accused has a constitutional right to be present at all stages of his trial but not at a conference or argument in a question of law. *People v. Teitel*.

[3] General Statutes Sec. 54-53a. DETENTION OF PERSONS WHO HAVE NOT MADE BAIL. "No person who has not made bail shall be detained in a community correctional center pursuant to the issuance of a bench warrant or for arraignment, sentencing or trial for an offense not punishable by death, for longer than forty-five days, unless at the expiration of such forty-five days he is presented to the court having cognizance of the offense. On each such presentment, such court may reduce, modify or discharge such bail, or may for cause shown remand such person to the custody of the commissioner of correction. On the expiration of each successive forty-five day period, such person may again by motion be presented to the court for such purpose."

Conn., [redacted] App. 34 184, 329 [illegible] 157, cert. denied, 229 U. S. 236, 79 S. Ct. 738, 3 L. Ed. 2d 739; *Jacobs* v. *United States*, 224 F.2d 688 (10th Cir.); *State* v. *Lill*, 2 N.J. 426, 67 A.2d 175; Rule 43 (e), Fed. Rules Crim. Proc.; Rule 39, Conn. Proposed Rules of Crim. Proc. (1978); see also 21 Am. Jur. 2d, Criminal Law, §§ 288, 289, 290; 23 C.J.S., Criminal Law, § 973, 974; note, 85 A.L.R.2d 1111. "Although some courts have held that a defendant has a right to be present even when questions of law are discussed; see, e.g., *State* v. *Vance*, 124 S.E.2d 252 (W. Va.); *State* v. *DeLoppo*, 86 Ohio App. 384, 92 N.E.2d 470; the better view would seem to be that there is no such absolute right; *United States* v. *Johnson*, 129 F.2d 954 (3d Cir.); especially when, as in the present case, the question of law is argued prior to the selection of the jury and the commencement of trial. Cf. *Talton* v. *Warden*, [redacted] Conn. 38 Conn. L.J., No. 6, pp. 1, 3). The question should be whether the defendant's presence bears "a relation, reasonably substantial, to his opportunity to defend." *Snyder* v. *Massachusetts*, 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 674. On the record before us, there would have been no "advantage" to having the defendant present when the motions in question were discussed. Id., 108. The court properly refused the defendant's request to be present during the argument of preliminary motions.

V

As the trial was about to begin, the defendant moved to dismiss the information, claiming that privileged communications from his attorney had been intercepted by agents of the state. The defendant testified that a mail addressed to him by his attorney, characterized as containing trial strategy, had been opened outside of the defendant's presence at the community correctional center at New Haven, where he was being held pending trial. None of the letters which the defendant claims were opened was brought into court, nor was any evidence offered that the contents had been read or, if so, under what circumstances.

Ordinarily, such claims as were advanced by the defendant on this motion are made in civil rights cases. See, e.g., *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935; *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir.), cert. denied sub nom. *Oswald* v. *Sostre*, 405 U.S. 978, 92 S. Ct. 1199, 31 L. Ed. 2d 254. Cf. *Procunier* v. *Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224. In *Wolff* it is stated (p. 577): "The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials' opening the letters." The opinion, however, leaves unanswered whether an inmate must be present when mail from an attorney is being inspected as is required in some institutions. In this case, the evidence adduced by the defendant, upon the claim of the defendant in court, was clearly insufficient to warrant the granting of the relief requested. The court did not err in denying the motion to dismiss.

VI

The defendant challenged the jury array on the ground that the Connecticut jury selection statutes, §§ 51-218 through 51-221 of the General Statutes, violate the due process and equal protection clauses of the fourteenth amendment to the constitution of the United States. A motion to dismiss the jury panel was denied as was a motion in arrest of judgment assigning this as error. See Practice Book § 630; Maltbie, Conn. App. Proc. § 209.

The defendant's claims that the jury selection statutes are too vague, that they discriminate against women and felons, and that they deny a defendant the right to be tried before a jury drawn from a fair cross section of his community, require little discussion. In *State* v. *Brown*, [redacted] Conn. (37 Conn. L.J., No. 24, pp. 7, 8-9) these same claims, raised in language identical to that found in the present defendant's brief, were discussed at length, and the statutes in question were held to be constitutionally valid on their face.[2] The defendant has presented no arguments which would cause us to reassess our holding in *State* v. *Brown*, supra, nor has he offered any evidence that the application of these statutes has resulted, in his case, in a jury array that was other than a "fair cross section of the community."

VII

The defendant's final claim is that the court erred in denying his motion for trial by a jury of twelve. He argues that § 54-82 of the General Statutes,[3] which provides for trial by a jury of six in all criminal cases except those involving capital offenses, is invalid because it is contrary to the separation of powers provision of article second of the constitution of Connecticut.

The defendant does not claim that either the United States constitution or the Connecticut constitution guarantees a right to trial by a jury of

[2] The [illegible] counsel in the present case also represented the defendant in *State* v. *Brown*, [redacted] Conn. (37 Conn. L.J., No. 24, pp. 7, 8-9). In fairness to him, it should be noted that our decision in *State* v. *Brown*, supra, was released after he had filed his brief in this appeal.

[3] [Connecticut Statutes] Sec. 54-82. ACCUSED'S ELECTION OF TRIAL BY COURT OR BY JURY. . . . If the party accused does not elect to be tried by the court, he shall be tried by a jury of six except that no person shall, for a capital offense, be tried by a jury of less than twelve without his consent."

twelve. The United States Supreme Court has held that although the sixth amendment, as applied to the states through the fourteenth, guarantees a right to trial by jury in all state criminal cases other than those involving petty offenses; *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491, reh. denied, 392 U.S. 947, 88 S. Ct. 2270, 20 L. Ed. 2d 1402; it does not require that the jury in such cases consist of twelve members. *Williams* v. *Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446. Article IV of the amendments to the constitution of Connecticut, adopted in 1972, reads, in pertinent part, as follows: "The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, *to be established by law*." (Emphasis added.)[1] The defendant does claim, however, that any reduction in the number of jurors must, under our constitutional form of government, be implemented by judicial action rather than by the General Assembly.

The defendant first argues that, in accordance with our recent decision in *Szarwak* v. *Warden*, 167 Conn. 10, 355 A.2d 49, the phrase "to be established by law" as used in article IV of the amendment, must be construed as meaning "to be established by the judiciary." In *Szarwak*, we considered the meaning of a similar phrase, "to be defined by law," as used in article fifth of the constitution of Connecticut: "Sec. 1. The judicial power of the state shall be vested in a supreme court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law." We held that the phrase "shall be defined by law" did not vest the General Assembly with the power to create "lower courts" with so great a jurisdiction "as materially to detract from the essential characteristics of the Superior Court" as that court has historically been constituted. *Szarwak* v. *Warden*, supra, 40, quoting from *Waldenhaus* v. *O'Brien*, 130 Conn. 122, 140, 32 A.2d 547. We did not hold, as the defendant contends, that the phrase "by law," as used in article fifth, meant "by the Superior Court"; we simply held that the phrase must be construed with regard to maintaining the integrity of the Superior Court and that its meaning must be limited to prevent the General Assembly from interfering with the orderly performance by the Superior Court of its inherent functions." *State* v. *Ayala*, Conn. (37 Conn. L.J., No. 38, pp. 15, 17).

The defendant argues that the same considerations which compelled us to limit the phrase "by law" as used in article fifth also compel an interpretation of the phrase "by law," as used in amendment IV to the state constitution, to mean "by the judicial department." He contends that determining the number of jurors is an inherent function of the judicial department and that § 54-82 therefore constitutes an attempt by the General Assembly to invade the province of the judiciary, contrary to the mandate of article second of the state constitution, which provides for a separation of powers among the three branches of government.[2] Recently, in *State* v. *Clemente*, 166 Conn. 501, 508–11, 353 A.2d 723, we reiterated our often-stated holding that article second prohibits the legislature from exercising those powers which are inherently within the sphere of the judiciary. See *Norwalk Street Ry. Co.'s Appeal*, 69 Conn. 576, 597, 37 A. 1080. We then set out a quite specific test for determining when a legislative act impermissibly infringes upon the judiciary: "To be unconstitutional in this context, a statute must not only deal with subject matter which is within the judicial power, but it must operate in an area which lies *exclusively* under the control of the courts." (Emphasis added.) *State* v. *Clemente*, supra, 510–11.

We are not persuaded that the determination of the number of jurors is a matter "which lies exclusively under the control of the courts." It is doubtful whether the setting of the number of jurors has ever been a function of the judiciary, whether under English common law, in this nation, or in this state. See *Williams* v. *Florida*, 399 U.S. 78, 87–103, nn. 19–45, 90 S. Ct. 1893, 26 L. Ed. 2d 446; *State* v. *Gannon*, 75 Conn. 206, 249–37, 52 A. 727; Phillips, "A Jury of Six in All Cases," 30 Conn. B.J. 354, 358 n.7. The General Assembly has taken an active role in controlling the number of jurors in Connecticut since colonial days; see, e.g., Statutes of 1784, p. 2; Cum. Sup. 1955, § 3326d (General Statutes § 54-82); which measures have traditionally been followed by the courts. See 1 Swift's Digest, p. 769 (1849 Rev.); *State* v. *Perrella*, 144 Conn. 228, 129 A.2d 226.

[1] "[T]he full text of the fourth amendment reads as follows: "[Conn. Const., Amend. IV.] Section 19 of article first of the constitution is hereby amended to read as follows: The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law; but no person shall, for a capital offense, be tried by a jury of less than twelve jurors without his consent. In civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate."

[2] "Recently we noted that 'the phrase "established by law" within the definition of "injury" encompasses legislation, as well as rules made by law.'" *Gentile* v. *Altermatt*, Conn. (37 Conn. L.J., No. 6, pp. 1, 7).

[3] "[Conn. Const., art. II] The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

"It is well settled that a [party] who attacks a statute on constitutional grounds has no easy burden." *Kellems* v. *Brown*, 163 Conn. 478, 486, 313 A.2d 53, appeal dismissed, 409 U.S. 1060, 93 S. Ct. 561, 34 L. Ed. 2d 678. "We approach the question with great caution, examine it with infinite care, make every presumption and intendment in favor of validity, and sustain the act unless its invalidity is, in our judgment, beyond a reasonable doubt." *Edwards* v. *Hartford*, 145 Conn. 141, 145, 139 A.2d 599. The defendant has not sustained his burden of establishing that § 54-82 impermissibly infringes upon the powers of the judiciary.

There is no error.

In this opinion the other judges concurred.

SUPREME COURT

April Term, 1976

HENRY M. ZACHS *v.* PUBLIC UTILITIES COMMISSION ET AL.

Appeal by the plaintiff from an order of the defendant commission approving an application by the defendant Southern New England Telephone Company for a higher rate schedule, brought to the Court of Common Pleas in Hartford County where the court, *Eidelson, J.*, sustained pleas in abatement filed by the defendants and rendered judgment dismissing the appeal, from which the plaintiff appealed to this court. *No error.*

Joseph S. Rucklin, with whom was *Joseph Sadaka*, for the appellant (plaintiff).

Marshall R. Collins, assistant attorney general, with whom, on the brief, was *Carl R. Ajello*, attorney general, for the appellee (named defendant).

William A. O'Keefe, with whom, on the brief, were *Lewis H. Ulman* and *James R. Greenfield*, for the appellee (defendant Southern New England Telephone Company).

MACDONALD, J. This is an appeal by the plaintiff, Henry M. Zachs, from a judgment rendered by the Court of Common Pleas dismissing his appeal from an order of the defendant public utilities commission which approved an application by the defendant Southern New England Telephone Company for a higher rate schedule. Dismissal of the appeal followed the sustaining by the Court of pleas in abatement filed by the defendants on the ground that a prior action was pending. No finding was requested or draft finding filed, but the facts necessary for a consideration of the issues raised are uncontroverted as summarized in the briefs.

By letter and application dated January 13, 1975, Southern New England Telephone Company, hereinafter referred to as SNETCO, requested authority of the public utilities commission (now reconstituted as the public utilities control authority—see 1975 Public Acts, No. 75-486), hereinafter referred to as the commission, to increase its rates and charges for telephone service. The commission gave this application docket number 11671 and thereafter conducted thereon twenty-two days of hearings between March 31, 1975, and May 14, 1975, having previously granted intervenor status and leave to appeal, pursuant to §§ 16-1-19 and 16-1-21 of the Regulations of Connecticut State Agencies, to the plaintiff, Zachs, a competitor of SNETCO in the field of furnishing to the general public mobile telephone service in automobiles and a radio paging service. On June 12, 1975, the commission filed its decision in docket number 11671 denying SNETCO's proposed amended schedule of rates and directing it to file an amended schedule in conformance with the decision and designed to produce additional revenue of approximately $48,829,000. This decision of June 12, 1975, did not find necessary or justified any increase in SNETCO's mobile telephone or radio paging rates.

On June 24, 1975, SNETCO filed an amended rate schedule in conformity with the order contained in the docket number 11671 decision of June 12, 1975, and thereafter, on June 30, 1975, the commission issued its supplemental decision under the same docket number, approving SNETCO's amended rate schedule, as filed, and authorizing application of such schedule on and after July 5, 1975. By writ, summons and complaint dated June 30, 1975, the plaintiff appealed the commission's original docket number 11671 decision to the Court of Common Pleas. In that appeal, which was given court docket number 118515, both SNETCO and the commission filed pleas in abatement alleging that the commission had not been summoned and that thirty-nine other intervenors, who had been given the same status as the plaintiff, had not been made parties and summoned to appear. These pleas in abatement were overruled by the court on September 29, 1975.

In the meantime, on July 30, 1975, by writ, summons and complaint dated July 29, 1975, the plaintiff filed a second appeal to the Court of Common Pleas which he described as being "an appeal from the supplemental decision of the PUC dated June

CERTIFICATE OF SERVICE

November 12, 1976

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of ~~New York~~ CONNECTICUT.

David I. Gottlieb